Supreme Court, U.S.
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No. 97-327

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CONSUMERS EDUCATION & PROTECTIVE ASSOCIATION and LANCE HAVER,

Petitioners,

v.

PENNSYLVANIA MILK MARKETING BOARD, LEHIGH VALLEY DAIRIES, INC., ATLANTIC DAIRY COOPERATIVE, PENNSYLVANIA ASSOCIATION OF MILK DEALERS, ROSENBERGER'S DAIRY, INC., CLOVER FARMS DAIRY, and WAWA DAIRY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT ATLANTIC DAIRY COOPERATIVE IN OPPOSITION

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September 22, 1997

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding, provided that Land O'Lakes, Inc. is successor in interest to Atlantic Dairy Cooperative by reason of a merger effective April 1, 1997. The former Atlantic Dairy Cooperative is operated as Land O'Lakes, Inc. Eastern Milk Operations.

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STATEMENT OF THE CASE

The petition seeks this Court's review of a decision of the Commonwealth Court of Pennsylvania ("Commonwealth Court") that the Pennsylvania Milk Marketing Law does not violate the Commerce Clause of the United

States Constitution. Several Respondents have filed briefs setting forth in detail the factual background of this case. To avoid repetition, this brief will summarize the significant factual background and the Court is respectfully referred to the briefs of the several Respondents for a more detailed review of the factual background.

The Commonwealth Court affirmed a General Order of the Pennsylvania Milk Marketing Board ("PMMB") which established minimum wholesale prices for milk in Pennsylvania Milk Marketing Area No. 1 (Philadelphia area). The General Order included prices charged to the School District of Philadelphia. The PMMB's original order was issued in September, 1995, was amended in October, 1995, and was based upon a hearing record which encompassed several days of hearings. Petitioners, together with the School District of Philadelphia, were petitioners before the Commonwealth Court and together sought review by the Pennsylvania Supreme Court which denied their petition for review on May 23, 1997. The School District of Philadelphia has not joined in this Petition for a Writ of Certiorari.

A. The Pennsylvania Milk Marketing Law.

The sale of milk in Pennsylvania is regulated by the Pennsylvania Milk Marketing Law ("the Law"), 31 Purdon's Pennsylvania Consolidated Statutes Annotated § 700j-101, et seq. The PMMB, an independent agency, is charged with implementation of the Law. The Law provides that the PMMB will set minimum prices for the wholesale and retail sale of milk by official order. (Section 802). These minimum prices are to be based upon "all conditions affecting the milk industry . . . including the amount necessary to yield a reasonable

return . . . on aggregate milk sales by milk dealers or handlers and stores selling milk". (Section 801) Prices are set based upon a hearing record, and the PMMB considers several factors including costs incurred by a cross section of dealers selling in the area. The rate of return allowed to such milk dealers is set forth in section 801 of the Law at two and one-half percent to three and one-half percent "based on net sales of price-controlled products determined in accordance with generally accepted accounting principles."

B. Procedural History.

Upon application of Respondent, Lehigh Valley Dairies, Inc., the PMMB held an evidentiary hearing which lasted for several days in June, 1995. The hearing record established that the Philadelphia Milk Marketing Area No. 1 is a competitive market with substantial competition from milk dealers based in Pennsylvania as well as New Jersey. The cross section of milk dealers utilized by the PMMB even included a New Jersey dealer.

At the hearing, the School District of Philadelphia sought a reduction of five cents in the price of half-pint containers of milk utilized by the School District and offered evidence that milk prices charged in Pennsylvania are higher than milk prices charged in parts of neighboring states. The School District of Philadelphia offered evidence that a milk dealer from which it purchases half-pints of milk also sells half-pints to urban schools in New Jersey at approximately four cents less per half-pint than it is required to pay under the PMMB's official order.

Based upon the hearing record, Official General Order A-890 was issued by the PMMB effective October 1,

1995. The Official General Order reduced half-pint prices for milk sold to schools by approximately one and one-third cents.

REASONS FOR DENYING THE WRIT

The petitioners' claim does not warrant review by this Court. The decision by the Court below that the Pennsylvania Milk Marketing Law does not violate the Commerce Clause of the United States Constitution was a plainly correct application of long settled law. There is no conflict between the circuits.

1. In *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 (1939), this Court considered the constitutionality of the Pennsylvania Milk Control Law and found that minimum prices established on milk purchased by an out-of-state dealer from a Pennsylvania milk producer, where the milk goes into interstate commerce, does not violate the Commerce Clause of the United States Constitution. In *Sylvan Seal Milk, Inc. v. Milk Control Commission,* 246 F. Supp. 1001 (E.D. Pa. 1967), the District Court found no substantial constitutional questions as to the validity of the Pennsylvania Milk Control Law. Thus, we start with well reasoned decisions that Pennsylvania Milk Control Law is not, per se, unconstitutional. See also, *Penn Dairies, Inc. v. Milk Control Commission,* 318 U.S. 261, 63 S.Ct. 617, 87 L.Ed. 748 (1943).

In regulating commerce among the several states, the Commerce Clause limits the power of the several states to enact laws which discriminate against or impose unjustifiable burdens on interstate commerce. This interpretation is clear and well settled. However, state statutes the effect of which is to impose only an inci-

dental burden on interstate commerce have been recognized to be an unavoidable result of a state's legislative effort to protect the health and safety of the inhabitants of the state. *Philadelphia v. New Jersey,* 437 U.S. 617, 98 S.Ct. 1231, 57 L.Ed.2d 475 (1978). Such statutes are valid and must be distinguished from state statutes that affirmatively discriminate against interstate commerce. *Maine v. Taylor,* 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). In *Eisenberg, supra,* this Court recognized that state statutes exercising the state's police power will necessarily have some effect upon interstate commerce but so long as it only incidentally or indirectly burdens interstate commerce it does not violate the commerce clause. It is also clear and well settled that where a statute even-handedly affects both in-state and interstate interests, but does not prohibit the flow of interstate goods, place added costs upon them or distinguish between in-state and out-of-state companies in the retail market, the statute does not discriminate against interstate commerce. *Exxon Corporation v. Governor of Maryland,* 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), *Ford Motor Co. v. Insurance Com'r. of Comm. of PA,* 874 F.2d 926 (3rd Cir. 1989); *Norfolk Southern Corp. v. Oberly,* 822 F.2d 338 (3rd Cir. 1987).

The United States District Court for the Middle District of Pennsylvania has found that the Pennsylvania milk control statute does not burden, and has only an incidental effect upon, interstate commerce. *United Dairy Farmers Coop. Assoc. v. Milk Control Commission,* 335 F. Supp. 1008 (M.D. Pa. 1971), *aff'd,* 404 U.S. 930, 92 S.Ct. 280, 30 L.Ed.2d 244 (1971).

2. Petitioners "protectionist" argument is without merit. The statute treats in-state and out-of-state, efficient and inefficient, dealers the same. The same burdens fall equally upon in-state and out-of-state dealers and the fact that those out-of-state dealers who do business in Pennsylvania are affected by the statute does not constitute discrimination in violation of the Commerce Clause. *Exxon Corporation v. Governor of Maryland,* supra; *Norfolk Southern Corp. v. Oberly,* supra.

3. Local interests are promoted by the Milk Control Law and outweigh any incidental burden on interstate commerce. The Legislature of the Commonwealth of Pennsylvania has reconsidered milk price controls on several occasions and has decided that price controls are necessary to promote the overall regulatory scheme. A legitimate state objective is discernable from the Legislative Purpose and Preamble to the Law. The purpose is stated to be, inter alia, "the protection of the public health and welfare and for the prevention of fraud". 31 Pa. C.S.A. §700j-101. The Legislature also set forth in the Preamble to the Law that the milk industry in Pennsylvania is "a business affecting the public health and affected with the public interest". Since milk is a vital commodity in Pennsylvania and the Legislature found that an adequate supply at a stable price is required for the benefit of the inhabitants of the state, retail minimum price controls are ā rational means to achieve that objective. *Finucane v. PA Milk Marketing Board,* 582 A.2d (1152 Pa. Cmwlth. 1990).

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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Dated: September 22, 1997